86-765

No. 86-

Supreme Court, U.S.
FILED
NOV 12 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

MISSOURI PACIFIC RAILROAD COMPANY
and JOSEPH FALVEY,
Petitioners,

v.

C. RUDOLPH EVANS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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November 12, 1986

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QUESTION PRESENTED

Section 3 of the Railway Labor Act, 45 U.S.C. § 153, creates a mandatory federal arbitration remedy for railroad and airline employee grievances which preempts all otherwise applicable state causes of action. The question presented is whether a district court is barred from determining that a claim falls within the scope of Section 3, and therefore "arises under" the Railway Labor Act for purposes of federal removal jurisdiction, as long as the plaintiff avoids referring to the Railway Labor Act in his complaint.

LIST OF PARTIES

All parties to the proceedings below are listed in the caption of this petition. Petitioner Missouri Pacific Railroad Company is a wholly owned subsidiary of the Union Pacific Corporation, a publicly traded holding company. Missouri Pacific Railroad Company's subsidiaries and affiliates are as follows:

Alameda Belt Line
Alton & Southern Railway Company
American Refrigerator Transit Company
Arkansas & Memphis Railway Bridge
and Terminal Company
Belt Railway of Chicago
Bitter Creek Coal Company
Brownsville & Matamoros Bridge Company
CMT Ltd.
Calnev Pipe Line Company
Camas Prairie Railroad Company
Central California Traction Company
Champlin Alaska Pipeline, Inc.
Champlin Arguello Pipeline, Inc.
Champlin Canada, Ltd.
Champlin Gas Gathering, Inc.
Champlin Gas Pipeline, Inc.
Champlin Gas Processing Company
Champlin International Petroleum Company
Champlin Liquid Pipeline, Inc.
Champlin Marketing, Inc.
Champlin Midcontinent Crude Oil Pipeline, Inc.
Champlin Midcontinent Marketing, Inc.
Champlin Midcontinent Products Pipeline
Champlin Petrochemicals, Inc.
Champlin Petroleum Company
Champlin Pipeline, Inc.
Champlin Refining, Inc.
Champlin Trading Company
Chicago & Western Indiana Railroad Company

Chicago Heights Terminal Transfer
Railroad Company
Delta Finance Company, Ltd.
Denver Union Terminal Railway
Des Chutes Railroad Company
Doniphan, Kensett & Searcy Railroad
Elk Mountain Coal Company
Esperanza Pipeline Company
Galveston, Houston and Henderson
Railway Company
Great Southwest Railroad, Inc.
Hanna Basin Coal Company
Harbor Service Stations, Inc.
Houston Belt & Terminal Railway Company
Jefferson Southwestern Railroad Company
Kanda Development Company
Kansas City Terminal Railway Company
Longview Switching Company
Los Angeles & Salt Lake Railroad Company
MKT Exploration Company
MP Equipment Corporation
MP Redevelopment Corporation
Missouri Improvement Company
Missouri Pacific Air Freight, Inc.
Missouri Pacific Corporation
Missouri Pacific Intermodal Transport, Inc.
Missouri Pacific Truck Lines, Inc.
Mount Hood Railway Company
Nueces Pipeline, Inc.
Oakland Terminal Railway
Ogden Union Railway & Depot Company
Oregon Short Line Railroad Company
Oregon-Washington Railroad
& Navigation Company
Overthrust Pipe Line, Inc.
Pacific Subsidiary, Inc.
Pacific Rail System, Inc.
Panola Pipe Line, Inc.

Park Spring, Inc.
Penn Central Corporation
Portland Terminal Railroad Company
Portland Traction Company
Prospect Point Coal Company
Puebleo Union Depot and Railroad Company
Quality Aggregate Company
R M Leasing Company
Rock Springs Royalty Company
Rocky Mountain Energy Company
Sacramento Northern Railway
Southern Illinois and Missouri Bridge Company
Spokane International Railroad Company
St. Joseph & Grand Island Railway Company
St. Joseph Terminal Railroad Company
Standard Realty and Development Company
Stauffer Chemical Company of Wyoming
Stonegate Park, Inc.
Terminal Industrial Land Company
Terminal Railroad Association of St. Louis
Texas & Missouri Pacific Railroad Company
Texas City Terminal Railway Company
Tidewater Southern Railway Company
Trailer Train Company
UP Leasing Corporation
UP Sub, Inc.
Union Pacific Finance N.V.
Union Pacific Foundation
Union Pacific Freight Services Company
Union Pacific Fruit Express Company
Union Pacific Land Resources Corporation
Union Pacific Motor Freight Company
Union Pacific Railroad Company
Union Pacific Resources Corporation
Union Pacific Resources, Ltd.
Unita Development Company
Upland Industries Corporation

Upland Industrial Development Company
Wamsutter Pipeline, Inc.
Wasatch Insurance Limited
Weatherford Mineral Wells and Northwestern
Railway Company
Western Pacific Railroad Company
Winton Coal Company
WPX Freight System, Inc.
Yakima Valley Transportation Company

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v.

C. RUDOLPH EVANS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioners Missouri Pacific Railroad Company and Joseph Falvey respectfully request that the Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals reversing the judgment of the District Court and ordering the case to be remanded to the Circuit Court of the City of St. Louis, Missouri, is reported at 795 F.2d 57 (1986) and is reprinted at App. 1a-5a. The opinion of the District Court granting the petitioners' motion to dismiss is reported at 618 F. Supp. 930 (E.D. Mo. 1985) and is reprinted at App. 6a-11a.

JURISDICTION

The judgment order of the Court of Appeals was entered on July 8, 1986 (App. 12a). A timely petition for rehearing and suggestion for rehearing *en banc* was denied by order dated August 13, 1986 (App. 13a). The jurisdiction of this Court to review the Court of Appeals' judgment is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

1. Section 3 First (i) of the Railway Labor Act, 45 U.S.C. § 153 First (i), provides in relevant part:

> "The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, * * * shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the [National Railroad] Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes."

2. 28 U.S.C. § 1331 provides:

> "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."

3. 28 U.S.C. § 1337(a) provides in relevant part:

> "The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce * * *."

4. 28 U.S.C. § 1441(a) provides:

> "Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have

original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending."

5. 28 U.S.C. § 1445(a) provides:

"A civil action in any State court against a railroad or its receivers or trustees, arising under sections 51-60 of Title 45, may not be removed to any district court of the United States."

6. Section 1 of the Federal Employers' Liability Act, 45 U.S.C. § 51, provides in relevant part:

"Every common carrier by railroad while engaging in commerce between any of the several States or Territories * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce * * * for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier * * *."

STATEMENT OF THE CASE

This case arises out of an employment dispute between petitioner Missouri Pacific Railroad Company ("Missouri Pacific"), an interstate rail carrier, and respondent C. Randolph Evans, a Missouri Pacific carman. The employment relationship between the Missouri Pacific and respondent is governed by the Railway Labor Act, 45 U.S.C. §§ 151 *et seq.* (1982) ("RLA"), which establishes a comprehensive system of federal remedies governing disputes between employees and employers in the railroad and airline industries.[1] Under § 2(5) and § 3

[1] The Railway Labor Act's coverage extends to the airline industry under 45 U.S.C. §§ 181-88 (1982). See generally *International Ass'n of Machinists* v. *Central Airlines, Inc.*, 372 U.S. 682 (1963). Employers and employees subject to the Railway Labor Act are exempt from the coverage of the National Labor Relations Act. See 29 U.S.C. § 152(2)-(3) (1982).

First of the RLA, all "disputes * * * growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions" must be submitted to federally constituted arbitration panels known as railroad adjustment boards for resolution. 45 U.S.C. §§ 151a(5), 153 First; see generally *Union Pacific R. Co.* v. *Sheehan*, 439 U.S. 89 (1978); *Andrews* v. *Louisville & Nashville R. Co.*, 406 U.S. 320 (1972); *Pennsylvania R. Co.* v. *Day*, 360 U.S. 548 (1959). These disputes, legally designated as "minor disputes" under the RLA, are not limited to controversies that expressly involve the terms of applicable collective bargaining agreements; instead, they include claims "founded upon some incident of the employment relation * * * independent of those covered by the collective agreement" as well. *Elgin, Joliet & Eastern Ry. Co.* v. *Burley*, 325 U.S. 711, 723 (1945). When a minor dispute arises, the employee's sole recourse is the arbitral remedy created by the Railway Labor Act. The employee cannot evade § 3 First's exclusive remedial scheme by recasting his minor dispute in terms of a state contract or tort claim; the mandatory arbitral remedies created by § 3 First preempt all state causes of action, tort as well as contract, that otherwise would apply to minor disputes. *Andrews*, 406 U.S. at 323-25; see, *e.g.*, *Jackson* v. *Consolidated Rail Corp.*, 717 F.2d 1045 (7th Cir. 1983), *cert. denied*, 465 U.S. 1007 (1984); *Magnuson* v. *Burlington Northern, Inc.*, 576 F.2d 1367 (9th Cir.), *cert. denied*, 439 U.S. 930 (1978). Section 3 First's procedures govern a vast number of employee grievances annually—by recent estimate, over 180,000 grievances among major carriers in the railroad industry alone.[2]

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[2] See *Amicus* Brief for Association of American Railroads and National Association of Railroad Trial Counsel (hereinafter "AAR/NARTC Brief") at 7 & n.6, *Atchison, Topeka & Santa Fe Ry. Co.* v. *Buell*, No. 85-1140 (petition granted May 5, 1986) (more than 183,800 grievances handled annually by "chief operating officer * * * designated to handle such disputes" at 12 major carriers).

In this case, following an extended period of disability, respondent notified the Missouri Pacific in August 1983 that he was able to resume work. Complaint ¶ 3 (App. 18a); 795 F.2d at 57 (App. 2a). Respondent asserted seniority rights under the governing collective bargaining agreement which, in his view, entitled him to displace another Missouri Pacific employee from a particular carman position. Complaint ¶ 4 (App. 18a); 795 F.2d at 57 (App. 2a). The Missouri Pacific convened an employment hearing to determine respondent's eligibility for the desired position. 759 F.2d at 57 (App. 2a). During the course of that hearing, petitioner Joseph Falvey, a Missouri Pacific car foreman, allegedly stated that respondent was a liar and could not be trusted to tell the truth. Complaint ¶ 5 (App. 18a); 759 F.2d at 57 (App. 2a).

Rather than seek relief for this alleged misconduct through the administrative machinery created by § 3 First of the RLA, respondent filed a civil action on May 14, 1985, in a state trial court in Missouri. See App. 17a-20a. In the first count of his two-count complaint, respondent claimed that petitioner Falvey's alleged statements constituted common-law slander. Complaint Count I, ¶¶ 5-8 (App. 18a-19a). In the second count of the complaint, respondent asserted that Falvey's alleged statements and the Missouri Pacific's failure to prevent them violated the Federal Employers' Liability Act, 45 U.S.C. §§ 51 *et seq.* (1982) ("FELA"). Complaint Count II, ¶¶ 5-8 (App. 19a-20a).

Petitioners filed a timely removal petition with the United States District Court for the Eastern District of Missouri pursuant to 28 U.S.C. § 1441 (1982). See App. 14a-16a. The removal petition was premised on the ground that the RLA's procedures for resolving minor disputes provided the exclusive remedy for respondent's claims and hence that respondent's claims "arose under" federal law for purposes of federal jurisdiction. See 28

U.S.C. §§ 1331, 1337 (1982). Respondent did not file a motion to remand or otherwise oppose the removal petition before the District Court.

Petitioners thereafter moved to dismiss respondent's complaint on the ground that respondent's claims, although framed in terms of state common law and the FELA, involved a minor dispute under § 3 First of the RLA which must be resolved through the RLA's mandatory arbitration machinery. Respondent did not file an opposition to petitioners' motion to dismiss. The District Court granted petitioners' motion, holding that respondent's claims constituted a minor dispute under the RLA and that respondent had failed to state a claim under the FELA. 618 F. Supp. 930 (1985) (App. 6a-11a).

Respondent appealed the District Court's dismissal order to the Eighth Circuit, raising for the first time the argument that the District Court lacked subject-matter jurisdiction over his claims. The Court of Appeals accepted respondent's jurisdictional contention and directed the District Court to remand the case to state court. 795 F.2d 57 (1986) (App. 1a-5a). The Court of Appeals held that respondent's slander claim arose under state rather than federal law and that the preemptive effect of the RLA was relevant only as a defense to the state law claim, placing the claim outside the scope of the District Court's federal-question jurisdiction. 795 F.2d at 58 (App. 3a-4a). The Court of Appeals further held that removal of respondent's FELA claim was precluded under 28 U.S.C. § 1445(a), which provides that FELA actions commenced in state court may not be removed to federal district courts. 795 F.2d at 58-59 (App. 4a-5a). The Court of Appeals rejected petitioners' argument, premised on this Court's decisions in *Avco Corp.* v. *Aero Lodge No. 735*, 390 U.S. 557 (1968), and *Franchise Tax Board* v. *Construction Laborers Vacation Trust*, 463 U.S. 1 (1983), that respondent's claims necessarily arose under the RLA for jurisdictional purposes

because the RLA creates an exclusive scheme of administrative relief for minor disputes which displaces alternate remedies. Respondent did not challenge, and the Court of Appeals did not address, the merits of the District Court's determination that respondent's claims are minor disputes subject to the RLA's administrative remedies.

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals in this case places the Eighth Circuit squarely in conflict with the Courts of Appeals for the Fourth, Sixth, Seventh, and Ninth Circuits regarding federal removal jurisdiction in cases subject to the Railway Labor Act. Unlike the Eighth Circuit, these Circuits have held that claims within the scope of § 3 of the RLA "arise under" the RLA for purposes of federal removal jurisdiction even when the complaint avoids reliance on the RLA. As a general holding on the scope of federal-question jurisdiction, the Eighth Circuit's decision is contrary to the jurisdictional principles established by this Court in *Avco Corp.* v. *Aero Lodge No. 735*, 390 U.S. 557 (1968), and *Franchise Tax Board* v. *Construction Laborers Vacation Trust*, 463 U.S. 1 (1983), which establish that claims necessarily "arise under" federal law when state law in the field has been displaced by a comprehensive scheme of federal remedies. If the Eighth Circuit's decision is allowed to stand, it will significantly undermine the uniform system of mandatory arbitration established by § 3 of the Railway Labor Act, a system that extends to over 900,000 employees and hundreds of thousands of grievances annually. Review is particularly appropriate because the issues presented by this case are closely related to issues before this Court in *Metropolitan Life Ins. Co.* v. *Taylor* and *General Motors Corp.* v. *Taylor*, Nos. 85-686 and 85-688, as well as two other cases to be decided on the merits this Term.

I. The Eighth Circuit's Decision Squarely Conflicts With Decisions Of The Fourth, Sixth, Seventh, And Ninth Circuits Regarding Federal Removal Jurisdiction Under The Railway Labor Act

The issues of federal jurisdiction presented by this case arise on a frequent basis in the railroad and airline industries. As noted above, see pp. 3-4 *supra*, the Railway Labor Act creates a comprehensive and exclusive system of administrative remedies for resolving minor disputes between railroad and airline employees and their employers. It is common for employees to attempt to avoid this federally mandated arbitration process by casting minor disputes in the form of state tort claims and seeking relief in state courts. When presented with such suits, railroads and airlines not infrequently seek removal to federal court on the ground that while the employee has avoided referring to the RLA or invoking his rights under the collective bargaining agreement, the RLA preempts all state causes of action involving minor disputes and hence the employee's claim necessarily arises under federal law.

Prior to the Eighth Circuit's decision in this case, each of the Courts of Appeals that had addressed the question —the Sixth, Seventh, and Ninth—had held that federal jurisdiction is proper under these circumstances. See *Schroeder* v. *Trans World Airlines, Inc.*, 702 F.2d 189 (9th Cir. 1983); *Magnuson* v. *Burlington Northern, Inc.*, 576 F.2d 1367 (9th Cir.), *cert. denied*, 439 U.S. 930 (1978); *Graf* v. *Elgin, Joliet & Eastern Ry. Co.*, 790 F.2d 1341 (7th Cir. 1986); *McKinney* v. *International Ass'n of Machinists and Aerospace Workers*, 624 F.2d 745 (6th Cir. 1980); see also *Taylor* v. *General Motors Corp.*, 763 F.2d 216, 220 (6th Cir. 1985), *cert. granted*, 54 U.S.L.W. 3561 (U.S. Feb. 24, 1986) (Nos. 85-686 and 85-688).

In *Schroeder*, for example, airline employees filed suit in state court alleging that their removal from a train-

ing program violated the California Business and Professions Code. Although the employees omitted any reference to the RLA in their complaints, the Ninth Circuit held that the complaints arose under federal law and hence that the cases were properly removed to federal court. See 702 F.2d at 190-91. The Court of Appeals reasoned that "[a]rtful pleading by the plaintiff will not be allowed to conceal the true nature of the complaint." *Id.* at 191. Similarly, in *Magnuson*, the Ninth Circuit affirmed removal in a case in which a railroad employee sought relief for alleged emotional injuries resulting from a company disciplinary investigation, notwithstanding the fact that the employee cast his complaint exclusively as a common law action for intentional infliction of emotional distress. See 576 F.2d at 1368-70. Most recently, in *Graf*, the Seventh Circuit held that federal jurisdiction was proper when a railroad employee brought suit alleging that he had been discharged in retaliation for filing an FELA action against his employer. The employee cast his complaint as a state law action for wrongful discharge, but the Seventh Circuit, in an opinion by Judge Posner, held that the claim nonetheless arose under the RLA for purposes of federal jurisdiction. See 790 F.2d at 1344-46.[3]

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[3] The procedural setting of *Graf* differs slightly from that of cases like *Schroeder*, *Magnuson*, and *McKinney*, but the difference is of no consequence here. In *Graf*, as in the other cases, the plaintiff filed suit in state court and the defendant removed to federal court, but the plaintiff in *Graf* subsequently refiled the action as an original complaint in federal court. See 790 F.2d at 1343. As a result, the question formally presented to the Seventh Circuit was not whether the district court had removal jurisdiction under 28 U.S.C. § 1441, but whether it had original jurisdiction under 28 U.S.C. §§ 1331 and 1337. Those two questions are identical, however, for 28 U.S.C. § 1441(a) vests federal courts with removal jurisdiction over all cases "of which the district courts * * * have original jurisdiction." By definition, therefore, the Seventh Circuit's holding about the district court's original jurisdiction is equally applicable to removal jurisdiction.

These decisions follow directly from a "settled principle" of federal-question jurisdiction—the principle that "courts 'will not permit plaintiff to use artful pleading to close off defendant's right to a federal forum * * *.'" *Federated Department Stores, Inc.* v. *Moitie*, 452 U.S. 394, 397 n.2 (1981) (citation omitted). This "artful pleading" doctrine is a longstanding counterpart to the well-pleaded complaint rule, under which a federal question must appear on the face of a well pleaded complaint in order to support federal-question jurisdiction. The artful-pleading doctrine comes into play whenever federal law establishes a comprehensive scheme of federal remedies that preempts parallel state causes of action. In such cases, where the only source of law to which the plaintiff can look for relief is federal, the plaintiff may not evade federal jurisdiction by casting his complaint in terms of state law. This Court has held squarely that "if a federal cause of action completely pre-empts a state cause of action[,] any complaint that comes within the scope of the federal cause of action *necessarily* 'arises under' federal law." *Franchise Tax Board*, 463 U.S. at 24 (emphasis added). See generally 14A Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction* § 3722, at 243 (2d ed. 1985) (when plaintiff "characterize[s] his necessarily federal cause of action solely in state law terms * * * the federal removal court will look beyond the letter of the complaint to the substance of the claim in order to assert jurisdiction").

The seminal decision of this Court applying these principles is *Avco Corp.* v. *Aero Lodge No. 735*, 390 U.S. 557 (1968), in which the Court held that an employer's purported state law claim for breach of a collective bargaining agreement necessarily arose under federal law, and therefore was removable to federal court, because § 301 of the Taft-Hartley Act establishes a comprehensive body of federal law governing collective bargaining agreements that displaces state contract law. See 390 U.S. at 558-61;

see generally *Allis-Chalmers Corp. v. Lueck*, 105 S. Ct. 1904 (1985) (No. 83-1748). This Court reiterated the principles underlying *Avco* only four Terms ago in *Franchise Tax Board*. In accord with *Avco* and *Franchise Tax Board*, the Sixth, Seventh, and Ninth Circuits have concluded that the comprehensive federal remedial scheme established by the RLA for resolving minor disputes makes claims involving minor disputes inherently federal, even when they are presented as state causes of action. See, *e.g.*, *Graf*, 790 F.2d at 1344-46; *Schroeder*, 702 F.2d at 191; *McKinney*, 624 F.2d at 747. These decisions have been equally insistent that the expedient of framing a claim in terms of tort rather than contract does not remove the claim from the scope of the RLA's mandatory federal remedies for minor disputes, and therefore does alter the federal nature of the claim for purposes of removal. See *Graf*, 790 F.2d at 1345 ("The state cannot be allowed, merely by the label it attaches to the cause of action, to interfere with the administration of a federal statute."); *Magnuson*, 576 F.2d at 1368-70.

Both the reasoning and the result of the Eighth Circuit's decision in this case are squarely inconsistent with the decisions of these Courts of Appeals. Thus, the Eighth Circuit found it dispositive that the first count of respondent's complaint "appear[ed]" to set forth a state slander claim and that the second count was framed as an FELA claim. 795 F.2d at 58. Unlike the Sixth, Seventh, and Ninth Circuits, the Eighth Circuit declined to look to the substance of the complaint to determine whether the claims in fact involved a minor dispute under the RLA. The Eighth Circuit based its decision on the bald premise that "the federal preemption defense in response to a state law claim is not a ground for removal." *Id.* In contrast, the Court of Appeals decisions cited above have rejected that unqualified premise as inconsistent with the artful-pleading doctrine. See, *e.g.*, *Graf*, 790

F.2d at 1344 ("To conclude * * * that preemption never affects the nature of the plaintiff's claim would be inconsistent with the rule that a plaintiff cannot by 'artful pleading' prevent the removal of a claim that is really federal * * * .").

The Eighth Circuit's reasoning is at odds not only with the RLA decisions cited above, but also with Court of Appeals decisions applying *Avco* and *Franchise Tax Board* in other federal labor law contexts, particularly cases involving § 301 of the Taft-Hartley Act. See, *e.g.*, *Oglesby* v. *RCA Corp.*, 752 F.2d 272 (7th Cir. 1985); *Olguin* v. *Inspiration Consolidated Copper Co.*, 740 F.2d 1468 (9th Cir. 1984); *Eitmann* v. *New Orleans Public Service, Inc.*, 730 F.2d 359 (5th Cir.), *cert. denied*, 469 U.S. 1018 (1984). In each of these cases, Courts of Appeals have held where state law is displaced by a scheme of comprehensive federal remedies, so that the plaintiff's only possible recourse is federal law, the federal court has removal jurisdiction even when the plaintiff has purported to frame his claim solely in terms of state law. In *Eitmann*, for example, the Fifth Circuit expressly held that "where a state cause of action is preempted by section 301, the federal courts have original subject matter jurisdiction over the action despite the absence of a federal claim on the face of the complaint." 730 F.2d at 366. The Fifth Circuit reasoned that while federal preemption of state causes of action in some settings may constitute only a defense and therefore may not support federal-question jurisdiction, the result is necessarily different when "the preemptive force asserted to render original federal jurisdiction appropriate is the federal labor law." *Id.* at 366. Decisions like *Eitmann* recognize that the kind of preemption worked by federal labor laws, in which state causes of action not merely are preempted but are replaced by a comprehensive body of federal rights and remedies, takes the removal question outside the literal application of the well-pleaded com-

plaint rule. The Eighth Circuit's reasoning in this case is inconsistent with these decisions.

The Eighth Circuit's decision is equally inconsistent with the decisions of other courts in its treatment of respondent's purported FELA claim. Although 28 U.S.C. § 1445(a) prohibits the removal from state court of actions arising under the FELA, the Fourth Circuit has held that the same jurisdictional consequences result when a railroad employee casts a minor dispute as an FELA claim as when the employee casts the dispute as a state tort claim—namely, the claim arises under the RLA for purposes of federal-question jurisdiction and accordingly is removable, § 1445(a) notwithstanding. In *Adkins* v. *Chesapeake & Ohio Ry. Co.*, 122 L.R.R.M. 2368 (4th Cir.), *petition for cert. filed*, 54 U.S.L.W. 3463 (U.S. Dec. 24, 1985) (No. 85-1099), the Fourth Circuit affirmed the removal of a purported FELA claim to federal court where the claim was held to involve a minor dispute subject to the RLA. The Fourth Circuit affirmed on the basis of the district court's opinion, which expressly rejected the argument that § 1445(a) precluded removal.[4] The district court reasoned that ostensible FELA claims based on alleged supervisory harassment "are directly related to the employer-employee relationship and are within the exclusive province of the RLA" for purposes of federal-question jurisdiction. *Adkins* v. *Chesapeake & Ohio Ry. Co.*, 122 L.R.R.M. 2211, 2212 (S.D.W.Va. 1985). Accord, *Scales* v. *National Railroad Passenger Corp.*, 634 F. Supp. 1 (E.D. Pa. 1984) (claim of harassment in connection with disciplinary proceeding arises under RLA for purposes of removal jurisdiction even when framed as FELA claim; § 1445(a) no bar to removal). In this case, in contrast to *Adkins*, the

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[4] The Fourth Circuit's memorandum opinion, affirming on the basis of the district court's opinion, is reprinted in the appendix to the petition for certiorari in *Adkins* v. *Chesapeake & Ohio Ry. Co.*, No. 85-1099 (petition filed Dec. 24, 1985).

Eighth Circuit treated § 1445(a) as dispositive and declined to determine whether the purported FELA claim actually involved a minor dispute subject to the exclusive remedial provisions of the RLA. See 795 F.2d at 58-59 (App. 3a-4a).

Thus, the Eighth Circuit's decision in this case has created a direct conflict among the Courts of Appeals regarding the availability of removal jurisdiction in cases subject to the RLA. A conflict of this kind is particularly damaging when, as here, it affects companies and industries whose operations are inherently interstate in nature. Petitioners submit that review is warranted to resolve this division of authority.

II. The Eighth Circuit's Decision Is Inconsistent With This Court's Decisions in *Avco Corp.* v. *Aero Lodge No. 735* and *Franchise Tax Board* v. *Construction Laborers Vacation Trust*

The linchpin of the Eighth Circuit's decision in this case is the Court of Appeals' belief that RLA preemption necessarily constitutes a mere defense to state causes of action and therefore cannot support federal-question jurisdiction. 795 F.2d at 58 (App. 3a-4a). That premise is fundamentally at odds with this Court's decisions in *Avco* and *Franchise Tax Board.*

In *Avco*, the plaintiff's complaint avoided reliance on § 301 of the Taft-Hartley Act in favor of relief under state contract law. See *Avco Corp.* v. *Aero Lodge No. 735*, 376 F.2d 337, 339 (6th Cir. 1967), *aff'd*, 390 U.S. 557 (1968). Under the reasoning of the Eighth Circuit here, removal would have been improper in *Avco* because the complaint was framed as a well-pleaded state cause of action, notwithstanding the fact that § 301 preempted the purported state claim. This Court held, however, that "the claim * * * is one arising under the 'laws of the United States' within the meaning of the removal statute" because § 301 displaces state contract law in

favor of federal remedies. *Avco*, 390 U.S. at 560. Similarly in *Franchise Tax Board*, this Court reiterated that federal jurisdiction is proper if the claim "is 'really' one of federal law"—that is, "if a federal cause of action completely preempts a state cause of action * * *." *Franchise Tax Board*, 463 U.S. at 13, 24. As this Court recognized in *Franchise Tax Board*, this principle applies notwithstanding the general rule that " 'a suit brought upon a state statute does not arise under an act of Congress * * * because prohibited thereby.' " *Id.* at 12 (quoting *Gully* v. *First National Bank*, 299 U.S. 109, 116 (1936)).[5] *Avco* and *Franchise Tax Board* thus make clear that, contrary to the Eighth Circuit's reasoning, a railroad employee's complaint is not insulated from removal merely because the complaint omits any reference to the RLA.

This Court's decisions also make it clear that respondent's complaint is not shielded against removal because it is cast as a tort rather than a contract claim. In *Andrews* v. *Louisville & Nashville R. Co.*, 406 U.S. 320 (1972), a railroad removed an employee's tort action for

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[5] *Franchise Tax Board* thus draws a distinction between federal law which merely bars relief under state law, leaving the state-law nature of the underlying claim intact, and federal law which replaces state causes of action with an exclusive scheme of federal remedies, making the underlying claim necessarily federal. It is that distinction which sets this case apart from *First National Bank* v. *Aberdeen National Bank*, 627 F.2d 843 (8th Cir. 1980) (en banc), on which the Eighth Circuit purported to rely here. See 795 F.2d at 58 (App. 3a-4a). In *First National Bank*, the Eighth Circuit held that a state-law claim of unfair competition against a bank did not "arise under" the National Bank Act, despite the assertion that § 30 of the National Bank Act preempted the state claim, because § 30 did not substitute any corresponding federal right of action for the preempted state claim. See 627 F.2d at 852-53. Here, in contrast, as explained above, the RLA not only bars the application of state law but substitutes a comprehensive and exclusive system of federal rights and remedies. The Eighth Circuit thus erred in assuming that *First National Bank* supports the result reached here.

wrongful discharge from state to federal court and sought dismissal of the claim as preempted by the RLA. This Court held squarely that the RLA's mandatory arbitration procedures provided the exclusive remedy for the employee, notwithstanding the fact that the plaintiff had sued in tort rather than contract. 406 U.S. at 323-24. *Andrews* establishes that the preemptive scope of the RLA, and hence the field within which purported state law claims actually arise under federal law, is not confined to disputes that are presented in explicitly contractual terms. See, *e.g.*, *Beers* v. *Southern Pacific Transp. Co.*, 703 F.2d 425 (9th Cir. 1983); *Magnuson*, 576 F.2d at 1369-70.[6] Indeed, courts have held specifically that purported slander claims by railroad employees arising out of workplace controversies constitute minor disputes within the scope of § 3. See, *e.g.*, *Carson* v. *Southern Ry. Co.*, 494 F. Supp. 1104 (D.S.C. 1979); *Barchers* v. *Missouri Pacific R. Co.*, 669 S.W.2d 235 (Mo. Ct. App. 1984).

III. The Eighth Circuit's Decision Threatens To Undermine The Railway Labor Act's Congressionally Mandated Arbitration Scheme

The Eighth Circuit's decision in this case merits review not only because it is inconsistent with other Court of Appeals decisions and this Court's own precedents, but also because it threatens the interests in uniformity and stability that led Congress to enact the Railway Labor Act. This Court has held that § 3 of the RLA was de-

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[6] This Court recently has underscored the same principle under § 301 of the Taft-Hartley Act in *Allis-Chalmers*. In *Allis-Chalmers*, the Court held that § 301 preempted a state cause of action for bad faith handling of an insurance claim. In so holding, the Court reasoned that "the pre-emptive effect of § 301 * * * extend[s] beyond suits alleging contract violations" to include tort claims related to the parties' contractual rights. 105 S. Ct. at 1911. The Court recognized that "[a]ny other result would allow parties to evade the requirements of § 301 by re-labeling their contract claims as claims for tortious breach of contract." *Id.*

signed to create a "mandatory, exclusive and comprehensive system for resolving grievance disputes" between railroads and their employees. *Brotherhood of Locomotive Engineers* v. *Louisville & Nashville R. Co.*, 373 U.S. 33, 38 (1963). Congress created a mandatory federal arbitration process for these minor disputes because it "considered it essential to keep * * * 'minor' disputes within the Adjustment Board[s] and out of the courts." *Sheehan*, 439 U.S. at 94. Like § 301 of the Taft-Hartley Act, § 3 of the RLA was meant to replace state law with a uniform body of federal law governing disputes relating to the contractual labor relationship. See *Andrews*, 406 U.S. at 323; see also *Walker* v. *Southern Ry. Co.*, 385 U.S. 196, 199 (1966) (Harlan, J., dissenting) ("labor contracts governed by * * * the Railway Labor Act are subject to federal substantive law, not state law"). Congress's ultimate goal in creating this system of administrative remedies for minor disputes was to bring stability to the railroad industry by ensuring the uniform application of federal remedies to workplace controversies. See, *e.g.*, *Pennsylvania R. Co.* v. *Day*, 360 U.S. at 551-53; *Slocum* v. *Delaware, Lackawanna & Western R. Co.*, 339 U.S. 239, 243 (1950).

As a practical matter, the Eighth Circuit's decision undercuts this Congressional scheme. It permits any railroad or airline employee, in any of the hundreds of thousands of grievances arising annually, to avoid federal jurisdiction by casting minor disputes in the form of state tort claims or FELA claims. As a result, rather than being resolved uniformly through the federal courts, issues of RLA preemption will devolve to 50 independent state court systems. There already exists considerable confusion and inconsistency among state courts concerning the scope of federal preemption under the RLA, with some state courts following the prevailing preemption standards of the federal courts and other state courts giving far less consideration to assertions of RLA preemption. Compare, *e.g.*, *Koehler* v. *Illinois Central Gulf*

R. Co., 488 N.E.2d 542 (Ill. 1985) (holding tort claims preempted), *cert. denied*, 54 U.S.L.W. 3859 (U.S. June 30, 1986), and *Barchers* v. *Missouri Pacific R. Co.*, 669 S.W.2d 235 (Mo. Ct. App. 1984) (same), with *Pikop* v. *Burlington Northern R. Co.*, 390 N.W.2d 743 (Minn. 1986) (rejecting preemption), and *DeTomaso* v. *Pan American World Airways, Inc.*, 220 Cal. Rptr. 493 (Ct. App. 1985) (same), *review granted*, 714 P.2d 1239 (Cal. 1986). By shifting the locus of litigation over RLA preemption from the federal courts to the state courts, the Eighth Circuit's decision will only exacerbate these conflicts. Because state courts generally have proven less willing to find purported state claims preempted by the RLA, the result is likely to be not only greater inconsistency in the resolution of RLA preemption issues, but also an increased risk that cases which belong in the RLA's remedial scheme will ultimately be entertained on the merits in state court, contrary to the basic purposes of the RLA.

The Eighth Circuit's decision is also disturbing as a practical matter because, while the Court of Appeals did not reach the substantive question of RLA preemption, its general unwillingness to look beyond the literal terms of respondent's complaint is at odds with the prevailing approach in other Circuits for determining RLA preemption. See, *e.g.*, *Jackson*, 717 F.2d at 1048-54; *Magnuson*, 576 F.2d at 1368-70. If the Eighth Circuit's literal-minded approach is extended from the issue of federal jurisdiction alone to the underlying issue of preemption, railroad employees will be able to evade mandatory arbitration at will simply by recasting their grievances as state tort claims or FELA claims. The result would be to create a major gap in the RLA's remedial scheme for minor disputes, directly contrary to Congress's intention of creating a mandatory extrajudicial remedy for such disputes.

The potential impact of the Eighth Circuit's decision is particularly striking given the sheer number of dis-

putes that it affects. The railroad and airline industries currently employ over 900,000 persons, and as noted above, more than 180,000 grievances are presented annually to the major carriers in the railroad industry alone.[7] If the Eighth Circuit's decision were to lead even a small percentage of these grievances to be pursued in state court rather than being handled through § 3 First's arbitration procedures, the result would be a major influx of cases into the state courts. Regardless of whether state courts allowed such cases to proceed on the merits, the added judicial burden of handling the litigation would be considerable. Such a burden should not have to be borne by the state courts without this Court first determining whether federal law requires it.

IV. The Issues In This Case Are Closely Related To Issues Now Before This Court In Other Granted Cases

As explained above, this case presents important questions of federal jurisdiction relating to federal labor preemption. This Court already has decided to hear argument during this Term in several cases presenting closely related issues. Granting certiorari in this case will give the Court a more considered basis for resolving the issues common to these cases.

The pending cases most closely related to this one are the consolidated cases of *Metropolitan Life Ins. Co.* v. *Taylor* and *General Motors Corp.* v. *Taylor*, Nos. 85-686 and 85-688 (cert. granted Feb. 24, 1986). The *Taylor* cases present the same underlying questions of federal removal jurisdiction in connection with a different federal statute—the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001 *et seq.* (1982 & Supp. III 1985) ("ERISA"). In the decision below in the *Taylor*

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[7] See Bureau of Labor Statistics, U.S. Dep't of Labor, *Employment and Earnings*, January 1986, at 186 (922,000 persons employed in railroad and air transportation industries on average during 1985); AAR/NARTC Brief, p. 4 n.2 *supra*, at 7 & n.6.

cases, the Sixth Circuit held that a state contract claim for nonpayment of group disability benefits could not be removed to federal court, notwithstanding the defendants' argument that ERISA provided the plaintiff's exclusive avenue of relief and that the claim therefore necessarily arose under federal law. *Taylor* v. *General Motors Corp.*, 763 F.2d 216 (6th Cir. 1985). The Sixth Circuit reasoned that the complaint was confined to state law and that "[t]he federal question relied on for removal is based upon [the defendants'] defense" rather than being a necessary part of the plaintiff's claim. *Id.* at 219. The petitions for certiorari in the *Taylor* cases present the question whether the Sixth Circuit correctly analyzed the jurisdictional effects of ERISA preemption under this Court's *Avco* and *Franchise Tax Board* decisions.

Like this case, therefore, the *Taylor* cases turn on the meaning of *Franchise Tax Board*'s rule that "if a federal cause of action completely pre-empts a state cause of action[,] any complaint that comes within the scope of the federal cause of action necessarily 'arises under' federal law." *Franchise Tax Board*, 463 U.S. at 24. Review of this case along with the *Taylor* cases would be particularly valuable because the Sixth Circuit premised its holding on what it believed to be a distinction between the jurisdictional effects of federal labor law preemption and the jurisdictional consequences of ERISA preemption. The Sixth Circuit "recognize[d] that as a general rule courts permit removal to federal court, notwithstanding the well-pleaded complaint doctrine, where an employee in a labor case attempts to assert a common law cause of action against his employer." 763 F.2d at 220. The Sixth Circuit declined to follow this authority with respect to the ERISA issues before it, however, because it believed that "cases implicating ERISA differ from those involving the federal labor laws generally." *Id.* The Sixth Circuit's decision in *Taylor* thus presents this Court with the need to resolve the relationship between removal

jurisdiction in traditional labor cases and removal jurisdiction in ERISA cases. This case offers the Court a meaningful basis for comparing the two bodies of law.

This case is also related to two other cases in which the Court has granted certiorari. The first, *International Brotherhood of Electrical Workers* v. *Hechler*, No. 85-1360 (cert. granted May 19, 1986), involves the removability of a state cause of action claimed to be preempted by § 301 of the Taft-Hartley Act and the National Labor Relations Act. In the decision below, a union member who sustained work-related injuries brought a common law negligence action against her union for failing to ensure that she had sufficient training for her work. The union sought removal on the ground that the plaintiff's negligence action was predicated on the union's duties under the collective bargaining agreement, bringing the claim within the preemptive scope of § 301 under *Avco*, and on the alternate ground that the claim really was one for breach of the federal duty of fair representation. The Eleventh Circuit held that removal was improper because the claim did not come within the preemptive scope of either § 301 or the duty of fair representation. *Hechler* v. *International Brotherhood of Electrical Workers*, 772 F.2d 788 (11th Cir. 1985). Although the petition for certiorari in *Hechler* focuses on the Eleventh Circuit's preemption analysis rather than on its application of *Avco*, *Hechler* necessarily shares with this case the question of how federal courts should address removal of state causes of action when those causes of action are claimed to be preempted by federal labor law.

The other pending case whose issues are related to this case is *Atchison, Topeka & Santa Fe Ry. Co.* v. *Buell*, No. 85-1140 (cert. granted May 5, 1986). In *Buell*, the Ninth Circuit held that a railroad employee's allegations of psychological harm from workplace harassment stated a claim for relief under the FELA and that the

allegations did not constitute a minor dispute subject to the remedial provisions of the RLA. *Buell* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 771 F.2d 1320 (9th Cir. 1985). This Court's grant of certiorari in *Buell* will require the Court to consider carefully the relationship between the FELA and the RLA. *Buell* is therefore directly related to the Eighth Circuit's FELA ruling in this case, since the Eighth Circuit denied removal of respondent's purported FELA claim in the face of petitioners' argument that the claim falls within the ambit of the RLA rather than the FELA.

Review of the Eighth Circuit's decision is warranted not only because the decision is inconsistent with the precedent of this Court and other Courts of Appeals, and because the decision threatens to undermine the intended operation of the Railway Labor Act, but because review will complement this Court's deliberations in the *Taylor* cases as well as in *Hechler* and *Buell*. If the Court nonetheless should conclude that the issues in those cases can be resolved adequately without reviewing this case and that review of this case is not independently warranted, this petition should be held pending the Court's disposition of those cases and then dealt with consistently thereafter.

CONCLUSION

The petition for certiorari should be granted. In the alternative, the petition should be held pending this Court's disposition of *Metropolitan Life Ins. Co.* v. *Taylor* and *General Motors Corp.* v. *Taylor*, Nos. 85-686 and 688, *International Brotherhood of Electrical Workers* v. *Hechler*, No. 85-1360, and *Atchison, Topeka & Santa Fe Ry. Co.* v. *Buell*, No. 85-1140, and disposed of consistently with the Court's decisions in those cases.

Respectfully submitted,

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November 12, 1986

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 85-2233

C. RANDOLPH EVANS,
Appellant,

v.

MISSOURI PACIFIC RAILROAD COMPANY
and JOSPEH FALVEY,
Appellees.

Appeal from the United States District Court
for the Eastern District of Missouri

Submitted: April 15, 1986

Filed: July 8, 1986

Before ROSS, Circuit Judge, HENLEY, Senior Circuit Judge, and ARNOLD, Circuit Judge.

ROSS, Circuit Judge.

C. Randolph Evans appeals the dismissal of his complaint alleging slander plus injury and damages pursuant to the Federal Employers' Liability Act, 45 U.S.C.

§ 51 *et. seq.* (1972). The district court granted the motion to dismiss finding that the case was a "minor dispute" under the Railway Labor Act, 45 U.S.C. § 151 *et. seq.* (1972), and as such, required arbitration rather than court adjudication. This case had been removed to the federal district court for the Eastern District of Missouri from the Circuit Court of the City of St. Louis. For the reasons hereinafter stated, we reverse and remand.

Background

Appellant C. Randolph Evans was employed by appellee Missouri Pacific Railroad Company. After being disabled for over a year, appellant informed the company agent, appellee Joseph Falvey, that he was able to resume working. An employment hearing was conducted to determine the personnel that would occupy the positions available. Appellant states that during the hearing appellee Falvey slandered him by saying to a third person that Evans could not be trusted to tell the truth and that Evans was a liar.

Appellant Evans originally brought an action in the Circuit Court of the City of St. Louis. The complaint alleged common law slander and injury and damages pursuant to the Federal Employers' Liability Act (FELA). Appellee Missouri Pacific Railroad Company sought, and was granted, removal of the pending action to the United States District Court, claiming that the federal court had subject matter jurisdiction pursuant to 28 U.S.C. § 1441 (1973). Appellees then filed a motion to dismiss the complaint stating that the Railway Labor Act, 45 U.S.C. § 151 *et seq.*, requires that this case be submitted to arbitration rather than adjudicated through court proceedings. The motion to dismiss was granted. Appellant contends that the federal district court did not have subject matter jurisdiction and could not grant the motion to dismiss.

Discussion

Title 28 U.S.C. § 1441 provides in part:

> (a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.
>
> (b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

There is no general test formulated by the courts for determining when a case "arises under" federal law. *First National Bank v. Aberdeen National Bank*, 627 F.2d 843, 849 (8th Cir. 1980) (*en banc*). "[A] right created by federal law must be an essential element of plaintiff's cause of action, [and the essence of the federal claim must appear on the face of the complaint], unaided by the answer or petition for removal." *Id. citing Gully v. First National Bank*, 299 U.S. 109 (1936).

Appellant filed a two-count petition in which the first count alleged slander by the appellees Missouri Pacific Railroad Company and Joseph Falvey. Appellant's complaint does not show a federal right as an essential part of his claim. Appellee contends that appellant has attempted to draft his complaint around what is essentially a federal cause of action. We disagree. The first count appears to set forth a well-pleaded state claim of slander.

Appellees contend that the complaint, as a "minor dispute",[1] arises under the Railway Labor Act and therefore federal law precludes and preempts the application of a common law or FELA remedy. Appellees argue that if a claim is in fact preempted by federal law, the claim necessarily arises under federal law and the removal court has jurisdiction. This court has held that the federal preemption defense in response to a state law claim is not a ground for removal. *First National Bank, supra*, 627 F.2d at 853. "[A]n assertion of preemption is a *defense* to plaintiff's state law claim and not a ground for federal jurisdiction." *Id.* at 851; *see also First Federal Savings & Loan Association v. Anderson*, 681 F.2d 528, 533 (8th Cir. 1982); *Lawrence County v. South Dakota*, 668 F.2d 27, 32 (8th Cir. 1982). Beyond the preemption defense we find that the complaint presents no questions which would require interpretation of the Railway Labor Act for their resolution. The district court did not have jurisdiction based on a federal question or otherwise.

The second count of the complaint alleged a cause of action pursuant to the Federal Employers' Liability Act, 45 U.S.C. § 51 *et seq.*

Title 28 U.S.C. § 1445 (Supp. 1986) states in pertinent part:

> (a) A civil action in any State court against a railroad or its receivers or trustees, arising under sections 51-60 of Title 45, may not be removed to any district court of the United States.

State courts have concurrent jurisdiction with federal district courts of an action by an employee against an

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[1] A "minor dispute" relates to the interpretation or application of a particular provision of the collective bargaining agreement or to a situation not covered by the agreement but which concerns the employment relationship. *Elgin, Joliet & Eastern R.R. v. Burley*, 325 U.S. 711, 723 (1945).

employer railroad under FELA. 45 U.S.C. § 56. However, if the employee chooses to bring an FELA claim in state court, section 1445(a) protects plaintiff's right to bring the action there and prevents removal to the federal district court by the railroad. *Burnett v. New York Central Railroad*, 380 U.S. 424, 434 (1965).

Accordingly, the holding of the district court that it had removal jurisdiction is reversed. The order of dismissal is vacated, and the case is remanded with instructions to remand to the state court.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 85-1317-C-(C)

C. RANDOLPH EVANS,

Plaintiff,

v.

MISSOURI PACIFIC RAILROAD COMPANY, and
JOSEPH FALVEY,

Defendants.

[Filed Sept. 9, 1985]

MEMORANDUM

This matter is before the Court upon defendants' motion to dismiss plaintiff's complaint because the Railway Labor Act, 45 U.S.C. § 151 et seq. (1982), requires that this case be submitted to arbitration, rather than adjudicated through court proceedings.

The relevant facts are as follows. Plaintiff was employed by defendant, Missouri Pacific Railroad Company (Missouri Pacific). Plaintiff was disabled and unable to work for more than one year. Plaintiff informed defendant's agent that he was capable of starting work again. An employment proceeding was conducted to determine which, if any, position plaintiff would hold. Plaintiff alleges that during the proceeding defendant Joseph Falvey, Missouri Pacific's agent, slandered plaintiff by stating that he could not be trusted to tell the

truth. Plaintiff's complaint contains two counts. The first count alleges common law slander. The second count alleges injury and damages pursuant to the Federal Employer's Liability Act, 45 U.S. § 51 et seq.

Count I

Railroad employee disputes are governed by 45 U.S.C. § 151 et seq. (1982), known as the Railway Labor Act. The Act states that one of its general purposes is, "to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions." 45 U.S.C. § 151(a)(5) (1982).

In interpreting 45 U.S.C. § 151(a)(5), the Supreme Court has held that it covers minor disputes, those situations where the collective bargaining agreement is not being changed or created. *Elgin, J. & E. R. Co. v. Burley*, 325 U.S. 711, 723 (1945). Rather, a minor dispute arises when the meaning or application of the collective bargaining agreement is at issue or when a situation arises which is not covered by the agreement but which concerns the employment relationship. *Id.* The Ninth Circuit Court of Appeals has held that a claim by a railroad employee is a minor dispute if it is arguably governed by the collective bargaining agreement or "has a 'not obviously insubstantial' relationship to the labor contract." *Magnuson v. Burlington Northern Inc.*, 576 F.2d 1367, 1369-70 (9th Cir. 1978), *cert. denied*, 439 U.S. 930 (1978).

Minor disputes involve the grievances that arise daily between employees and carriers regarding rates of pay, rules, and working conditions. *Union Pacific R. Co. v. Sheehan*, 439 U.S. 89, 94 (1978), *reh'g denied*, 439 U.S. 1135 (1979). Minor disputes involve specific grievances of a detailed or individual nature. *Elgin, supra* at 724.

Minor disputes must be submitted to the National Railroad Adjustment Board for arbitration before a court may obtain jurisdiction. *Andrews v. Louisville & Nashville R. Co.*, 406 U.S. 320, 322 & 325 (1972); *See also Raus v. Brotherhood Ry. Carmen of U.S. and Canada*, 663 F.2d 791, 794 (8th Cir. 1981).

The National Railroad Adjustment Board's authority to hear these disputes is governed by 45 U.S.C. § 153 First(i) (1982). The Supreme Court has held that 45 U.S.C. § 153 First is "a mandatory, exclusive, and comprehensive system for resolving grievance disputes . . . [and was] intended by Congress to be the complete and final means for settling minor disputes." *Locomotive Engrs. v. L. & N. R. Co.*, 373 U.S. 33, 38-39 (1963). Congress considered it essential to keep minor disputes within the jurisdiction of the National Railroad Adjustment Board and out of the courts. *Sheehan, supra* at 94.

Courts have liberally construed the term minor dispute in order to give the National Railroad Adjustment Board wide power to arbitrate cases. Retaliatory discharge is considered a minor dispute. *Landfried v. Terminal R. Ass'n. of St. Louis*, 721 F.2d 254 (8th Cir. 1983), *cert. denied*, 104 S.Ct. 1712 (1984); *Minehart v. Louisville & Nashville R. Co.*, 731 F.2d 342 (6th Cir. 1984); *Jackson v. Consolidated Rail Corp.*, 717 F.2d 1045 (7th Cir. 1983), *cert. denied*, 104 S.Ct. 1000 (1984). Intentional infliction of emotional distress is considered a minor dispute. *Magnuson, supra; Choate v. Louisville & Nashville R. Co.*, 715 F.2d 369 (7th Cir. 1983). One United States District Court has held that slander is a minor dispute. *Carson v. Southern Ry. Co.*, 494 F. Supp. 1104 (D.S.C. 1979).

The statutes and case law indicate that generally grievances between a railroad employee and the railroad company are minor disputes to be handled by the National Railroad Adjustment Board. However, federal

courts will hear cases involving outrageous conduct, conduct that "'no reasonable man in a civilized society should be expected to endure.'" *Farmer v. Carpenters*, 430 U.S. 290, 302 (1977). In determining whether conduct is outrageous and thus falls within the exception to the general rules, a court must balance the state's interest in controlling the conduct and whether such control would interfere with the federal scheme. *Id.* at 302-04.[1]

Because the state's interest in controlling certain conduct is a relevant factor in the balancing test, Missouri case law concerning railroad grievances will be considered. The Missouri Supreme Court has held that state and federal courts have only minimal responsibility in railway labor relations, and that parties must exhaust their administrative remedies. *Cook v. Brotherhood of Sleeping Car Porters*, 309 S.W.2d 579, 586 (Mo. 1958). Missouri courts have also defined the term minor dispute broadly, giving the National Railroad Adjustment Board wide jurisdiction. Emotional distress and wrongful discharge are considered minor disputes and are handled by the National Railroad Adjustment Board. *Burkin v. Burlington Northern R.R. Co.*, 690 S.W.2d 508 (Mo. Ct. App. 1985). In Missouri, libel actions are considered minor disputes for the National Railroad Adjustment Board. *Barchers v. Missouri Pacific R. Co.*, 669 S.W.2d 235 (Mo. Ct. App. 1984); *Alsbury v. Missouri Pacific R. Co.*, 670 S.W.2d 87 (Mo. Ct. App. 1984).

Applying these rules, the present case is a minor dispute and thus falls within the jurisdiction of the National Railroad Adjustment Board. The alleged slander may concern the collective bargaining agreement since it occurred during a proceeding to decide if plaintiff

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[1] *Jackson v. Consolidated Rail Corp., supra* at 1051-52 and *Majors v. U.S. Air, Inc.*, 525 F. Supp. 853, 855 (D. Md. 1981) are recent cases interpreting *Farmer v. Carpenters*.

should obtain a work position; in any event, the alleged slander concerns the employment relationship. Federal courts have liberally construed the term minor dispute, and the National Railroad Adjustment Board's corresponding authority. Under the facts in this case, slander is a minor dispute for the Adjustment Board. Finally, it is clear from the statutes and Supreme Court cases that courts should only hear railroad employee grievance cases when some outrageous conduct has occurred. There is no such outrageous conduct in this case and therefore no exception to the general rules.

Count II

Plaintiff contends that defendants' actions invoke liability under 45 U.S.C. § 51 et seq. (1982). For the reasons set forth below, plaintiff's 45 U.S.C. § 51 claim will be dismissed.

45 U.S.C. § 51 et. seq. is known as the Federal Employers' Liability Act (FELA). In interpreting FELA, the Supreme Court has held that the Act governs injuries or death resulting from accidents or diseases caused by working conditions. *Urie v. Thompson*, 337 U.S. 163, 180-81 (1949). Throughout their opinion, the Court interpreted the word injury to mean personal injury. *Id.* at 183-84. Similarly, the Fifth Circuit Court of Appeals has held that recovery under FELA is limited to personal injury cases. *Yawn v. Southern Ry. Co.*, 591 F.2d 312, 317 (5th Cir. 1979), *cert. denied*, 442 U.S. 934 (1979). FELA itself implies that it governs personal injury cases only. Plaintiff has not alleged any personal injury in his complaint.

Finally, 45 U.S.C. § 51 covers injuries due to the negligence of a common carrier. If proved, defendants' actions would constitute an intentional tort, not negligence.

For the above reasons, defendants' motion to dismiss plaintiff's complaint because the Railway Labor Act requires arbitration of this case, rather than court adjudication, will be granted.

DATED this 9th day of September, 1985.

/s/ J. H. Meredith
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 85-2233EM

C. RANDOLPH EVANS,

v. *Appellant,*

MISSOURI PACIFIC RAILROAD COMPANY, *et al.*,
Appellees

Appeal from the United States District Court
for the Eastern District of Missouri

[Filed July 8, 1986]

JUDGMENT

This appeal from the United States District Court was submitted on the record of the said district court, briefs of the parties and was argued by counsel.

Upon consideration of the premises, it is hereby adjudged and decreed that the judgment of the district court is reversed and remanded for further proceedings consistent with the opinion of this Court.

July 8, 1986

Costs taxed in favor of Appellant:

Clerk's docket fee:	$65.00
Costs of briefs:	$29.00
Total costs of Appellant for recovery from Appellees:	$94.00

A true copy:

ATTEST:

/s/ Robert D. St. Vrain
Clerk, U.S. Court of Appeals, 8th Circuit.
8/21/86

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 85-2233-EM

C. RANDOLPH EVANS,
Appellant,

vs.

MISSOURI PACIFIC RAILROAD COMPANY, *et al.*,
Appellees.

Appeal from the United States District Court
for the Eastern District of Missouri

Appellees' petition for rehearing en banc has been considered by the Court and is denied.

Petition for rehearing by the panel is also denied.

August 13, 1986

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Cause No. 85-1317-C-C

C. RANDOLPH EVANS,
Plaintiff,

v.

MISSOURI PACIFIC RAILROAD COMPANY, *et al.*,
Defendants.

[Filed June 10, 1985]

REMOVAL PETITION

COMES NOW Defendant Missouri Pacific Railroad Company, the Petitioner herein ("Defendant"), and for its Petition for Removal states as follows:

1. A civil action has been commenced and is now pending in the Circuit Court of the City of St. Louis, State of Missouri, wherein C. Randolph Evans is Plaintiff, and Petitioner herein as Defendant, said action being Cause Number 852-01594.

2. A copy of the Petition in Cause No. 852-01594 together with the Summons purportedly were served on Defendant on or after May 14, 1985. This Petition for Removal is filed within thirty (30) days of the service of Summons and Petition.

3. In his Petition, Plaintiff seeks to recover damages in excess of Ten Thousand Dollars ($10,000) allegedly

sustained by him as a result of allegedly slanderous statements made by Defendant in the course of employment procedures for the purposes of determining which employees would occupy available positions.

4. Defendant is entitled to remove Cause No. 852-01594 to this Court pursuant to 28 U.S.C. Section 1441 *et seq.* inasmuch as said cause number is a civil action which involves a federal question with an amount in controversy in excess of Ten Thousand Dollars ($10,000). Plaintiff alleges that defendant exercised improper procedures in determining who would fill available positions. This type of claim has traditionally been deemed a "minor dispute" under Section 3 of the Railway Labor Act. *Landfried v. Terminal R. Ass'n.*, 721 F.2d 254 (8th Cir. 1983). The Railway Labor Act preempts state law, and presents a federal question. *Andrews v. Louisville and Nashville R. Co.*, 406 U.S. 320 (1972).

5. Defendant herewith presents a cash bond as provided by statute on condition that Defendant will pay all costs and disbursements incurred by reason of this removal proceeding should it be determined that Cause No. 852-01594 was not removable or was improperly removed.

6. Promptly after the filing of this Petition for Removal and Bond, Defendant will give written notice thereof to Plaintiff and file a copy of the Removal Petition with the Clerk of the Circuit Court of the City of St. Louis, Missouri.

7. Attached hereto and market Exhibit No. 1, and made a part hereof, are copies of the Petition and Summons served on Defendant in Cause No. 852-01594. No other process, pleadings or orders have been served on Defendant in this action.

8. Defendant Joseph Falvey joins and consents to this Petition for Removal.

WHEREFORE, Defendant Missouri Pacific Railroad Company prays that Cause No. 852-01594 be removed

from the Circuit Court of the City of St. Louis, Missouri, to this Honorable Court and that this Court accept and approve the Bond and take jurisdiction of this action for trial and determination.

Respectfully submitted,

THOMPSON & MITCHELL

By: /s/ Donna Aronoff Smith
THOMAS R. JAYNE
25648
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(314) 231-7676
Attorneys for Defendants
Missouri Pacific Railroad
Company and Joseph
Falvey

STATE OF MISSOURI)
) ss.
CITY OF ST. LOUIS)

Donna Aronoff Smith, being first duly sworn upon her oath, states that she is one of the attorneys for Defendants herein and that she has read the foregoing Petition for Removal and that the averments contained therein are true according to her best information, knowledge and belief.

/s/ Donna Aronoff Smith
DONNA ARONOFF SMITH

Subscribed and sworn to before me this 10th day of June, 1985.

/s/ Linda C. Leugoud
LINDA C. LEUGOUD
Notary Public

My commission expires: Nov. 18, 1987

IN THE CIRCUIT COURT FOR THE
CITY OF ST. LOUIS
STATE OF MISSOURI

No. 852-01594

Division No. 1

C. RANDOLPH EVANS,

Plaintiff,

vs.

MISSOURI PACIFIC RAILROAD COMPANY,
210 North 13th Street
St. Louis, Missouri 63103, and

JOSEPH FALVEY, c/o
Missouri Railroad Company,
Poplar Bluff, Missouri,

Defendants.

PETITION FOR DAMAGES

COUNT I

Now comes the plaintiff, C. RANDOLPH EVANS, by his attorneys, STRELLIS & FAULBAUM, and for his cause of action against the defendants, MISSOURI PACIFIC RAILROAD COMPANY and JOSEPH FALVEY, states:

1. The defendant, Missouri Pacific Railroad Company, is now and at all times herein mentioned was a corporation duly organized and existing under and by virtue of law, and was at all times herein mentioned engaged in interstate commerce and transportation by railroad, and said defendant has and had at all times herein mentioned, an office and place of business in the City of St. Louis, Missouri.

2. At times pertinent hereto, the plaintiff C. Randolph Evans, was a carman employed by the defendant, Missouri Pacific Railroad Company, within the St. Louis Terminal Division.

3. On May 28, 1982, the plaintiff herein became disabled for work, and on August 5, 1983 plaintiff was released by his private physician for work so that he would be capable of being actively employed by the defendant, Missouri Pacific Railroad Company.

4. On August 6, 1983, the plaintiff informed the defendant, Joseph Falvey, a car foreman, that he was released for work and capable of performing services for the defendant, Missouri Pacific Railroad Company and he intended to displace fellow carman, Clyde L. Parmer, for the Poplar Bluff, Missouri, job formerly held by fellow carman, A. L. Gibson, within the Poplar Bluff Division of Missouri Pacific Railroad Company.

5. On August 8, 1983, the defendant, Joseph Falvey, and the defendant, Missouri Pacific Railroad Company, through its duly authorized car foreman, Joseph Falvey, intentionally and knowingly slandered the plaintiff, C. Randolph Evans, by stating to Stephen Robison, Sr. in St. Louis, Missouri, that the plaintiff could not be trusted to tell the truth and that the plaintiff was a liar.

6. The statements made by the defendants herein were made in the course of employment procedures for the purpose of determining the personnel that would occupy the positions that were available, and such statements were made in the furtherance of the business of the defendant, Missouri Pacific Railroad Company.

7. As a direct and proximate result of the slanderous statements made by the defendants herein, the plaintiff has been damaged monetarily and the plaintiff's character has been irreparably impaired, all to the damage of the plaintiff in the amount of Two Hundred Fifty Thousand Dollars ($250,000).

8. The statements herein alleged to have been made by the defendants, specifically, that C. Randolph Evans could not be trusted to tell the truth and that C. Randolph Evans was a liar, were uttered wilfully and intentionally; therefore, the plaintiff seeks punitive damages against the defendants herein.

WHEREFORE, the plaintiff, C. RANDOLPH EVANS, demands judgment against defendants, JOSEPH FALVEY and MISSOURI PACIFIC RAILROAD COMPANY, for the sum of Two Hundred Fifty Thousand Dollars ($250,000) actual damages and for the further and additional sum of One Million Dollars ($1,000,000) punitive damages, and for his costs of suit.

STRELLIS & FAULBAUM

By /s/ Jack A. Strellis
JACK A. STRELLIS #34186
115 East Mill Street
Waterloo, IL 62298
(618) 939-3404
Attorneys for Plaintiff,
C. Randolph Evans

PLAINTIFF DEMANDS
TRIAL BY JURY

COUNT II

Now comes the plaintiff, C. RANDOLPH EVANS, by his attorneys, STRELLIS & FAULBAUM, and for his cause of action against the defendant, MISSOURI PACIFIC RAILROAD COMPANY, states:

1.-4. Plaintiff repeats and realleges paragraphs one, two, three and four of Count I of this Complaint as paragraphs one, two, three and four of this count, Count II.

5. Plaintiff's cause of action herein is brought under the provisions of the Federal Employer's Liability Act, Title 45, United States Code, § 51 *et seq.*

6. On August 8, 1983, the defendant, Missouri Pacific Railroad Company, by and through its duly authorized car foreman, Joseph Falvey, negligently asserted to Stephen Robison, Sr., in St. Louis, Missouri, that plaintiff, C. Randolph Evans, could not be trusted and that C. Randolph Evans was a liar, thereby irreparably injuring plaintiff's character and reputation.

7. The defendant, Missouri Pacific Railroad Company, negligently failed to supervise its car foreman, namely, Joseph Falvey, so as to prevent statements that were slanderous to be made so that the reputation and character of the defendant's personnel, and, specifically, the plaintiff herein, would not suffer irreparable damage.

8. As a direct result of the negligence of the defendant, Missouri Pacific Railroad Company, as aforesaid, plaintiff has been damaged monetarily and the plaintiff's character and reputation have been irreparably impaired, all to the damage of the plaintiff in the amount of Two Hundred Fifty Thousand Dollars ($250,000).

WHEREFORE, plaintiff, C. RANDOLPH EVANS, demands judgment against the defendant, MISSOURI PACIFIC RAILROAD COMPANY, for the sum of Two Hundred Fifty Thousand Dollars ($250,000) actual damages and for his costs of suit.

STRELLIS & FAULBAUM

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PLAINTIFF DEMANDS
TRIAL BY JURY